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No. 00-948

In The
Supreme Court of the United States
October Term, 2000

UNITED AIR LINES, INC.,

Petitioner.

v.

LESLIE FRANK, ET AL.

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, THE COUNCIL FOR EMPLOYMENT LAW EQUITY, IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of this Court, the Council for Employment Law Equity ("CELE") by its undersigned counsel, hereby moves for leave to file its brief as an *amicus curiae* in support of Petitioner, United Airlines, Inc.* In support of its Motion, the CELE states:

The Council for Employment Law Equity ("CELE") is a non-profit coalition of major employers committed to the

* Prior to filing this Motion, the CELE sought the consent of all parties to the filing of its brief, as required by Rule 37.2 of this Court. The Petitioner consented to the CELE's request. The CELE received no response from Respondents to its requests, necessitating this Motion.

highest standards of fair, effective, and appropriate employment practices, and to the promotion of such employment practices in the employer community; before the judicial, legislative, and executive branches of government; and to the public at large.

The CELE believes that its *amicus curiae* participation will benefit the Court in this proceeding, as the organization and its members bring a unique perspective to the issues presented in this case. The CELE is a repository of extensive experience and resources on how current law, regulations, policies and practices impact the workplace. With the development and maintenance of a fair and productive workplace a primary goal, the CELE pays close attention to how the fallout of court decisions may impact this aim. Accordingly, the CELE and its members have an important perspective on the critical policy issues involved in this case.

WHEREFORE, the Council for Employment Law Equity respectfully requests that the Court grant its motion and permit it to file the accompanying brief as an *amicus curiae* in support of the Petitioner.

Respectfully submitted,

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CASES

Air Line Pilots Ass'n Int'l v. United Air Lines, Inc.,
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Alexander v. Aero Lodge No. 735,
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Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 7

Broaddus v. Florida Power Corp.,
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Deposit Guaranty Nat'l Bank v. Roper,
445 U.S. 326, *reh'g denied*, 446 U.S. 947 (1980) 5

DiBiase v. SmithKline Beecham Corp.,
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EEOC v. Francis W. Parker School,
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EEOC v. McDonnell Douglas Corp.,
191 F.3d 948 (8th Cir. 1999) 18

Ellis v. United Airlines, Inc.,
73 F.3d 999 (10th Cir. 1996) 17

Eubanks v. Billington,
110 F.3d 87 (D.C. Cir. 1997) 11

Frank v. United Airlines, Inc.,
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Gantt v. Wilson Sporting Goods Co.,
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Gonzales v. Cassidy,
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Hansberry v. Lee,
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Hazen Paper Co. v. Biggins,
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Holmes v. Continental Can Co.,
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In re Agent Orange Product Liability Litigation,
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In re A.H. Robbins Co., Inc.,
880 F.2d 709 (4th Cir.),
cert. denied, 493 U.S. 959 (1989)..... 9

Kyriazi v. Western Electric Co.,
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Markham v. Geller,
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Martin v. Wilks,
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Montana v. United States,
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Mullin v. Raytheon Co.,
164 F.3d 696 (1st Cir.),
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Prove v. State Teachers' Retirement System,
780 F.2d 776 (9th Cir.), *cert. denied*, 476 U.S. 1170
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Sam Fox Publishing Co. v. United States,
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Smith v. Xerox Corp.,
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Stewart v. Rubin,
948 F. Supp. 1077 (D.D.C. 1996) 10

United States Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 5, 8

Valerio v. Boise Cascade Corp.,
80 F.R.D. 626, *aff'd*, 645 F.2d 699,
cert. denied, 454 U.S. 1126 (1981) 12

STATUTES AND AMENDMENTS

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Pub. L. 102-106, 105 Stat. 1071 (1991) ..... *passim*

FEDERAL RULES

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OTHER AUTHORITIES

Edward F. Sherman,
Class Actions and Duplicative Litigation,
62 IND. L. J. 507 (SUMMER 1987) 7

EEOC Charge Statistics,
as published and available at
http://www.eeoc.gov/stats/charges.html 14

The Harvard Law Review Association,
Developments in the Law – The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives, 113 HARV. L. REV. *1806 (May 2000)* 5, 14

Howard N. Fullerton,
The 2005 Labor Force: Growing, But Slowly, MONTHLY LABOR REVIEW (Nov. 1995) 19

JAMES WM. MOORE ET AL.,
MOORE'S FEDERAL PRACTICE, § 23 (3d ed. 1999) ... 7, 11

Marika F.X. Litras,
"Civil Rights Complaints in U.S. District Court, 1990-98"
(NCJ-173427) 13, 15

THE OLDER AMERICAN WORKER:,
AGE DISCRIMINATION IN EMPLOYMENT (1965)
("The Report"), mandated by Pub. L. 88-352 § 715,
78 Stat. 265 (1964)..... 16, 17

RAND INSTITUTE FOR CIVIL JUSTICE,
Class Action Dilemmas, Pursuing Public Goals for Private Gain (Nov. 1, 1999) 14

Stacy Poulos and Demetra Smith Nightingale, *The Aging Baby Boom: Implications for Employment and Training Programs*, URBAN INSTITUTE, prepared for the U.S. Department of Labor, Employment and Training Administration, under Contract No. F-5532-5-00-80-30 19

Stephen Bough and Dirk Hubbard, *Issues in Employment Class Action Litigation*, 56 J. MO. BAR 37 (Jan./Feb. 2000) 6

Thomas Willging, Laurel Hooper and Robert Niemic, *Empirical Study of Class Actions in Four Federal District Courts*, Washington, D.C.: FEDERAL JUDICIAL CENTER (1996) 14

WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, Rule 23 (2d ed. 1986) 5, 9, 11

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BRIEF OF *AMICUS CURIAE*, THE COUNCIL FOR EMPLOYMENT LAW EQUITY, IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS*[1]

The Council for Employment Law Equity ("CELE") is a non-profit coalition of major employers committed to the highest standards of fair, effective, and appropriate employment practices, and to the promotion of such employment practices in the employer community; before the judicial, legislative, and executive branches of government; and to the public at large.

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[1] The CELE hereby certifies, in accordance with Rule 37.6 of this Court, that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the CELE, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

The CELE has a significant interest in the questions presented in this case. By (a) refusing to enforce a judgment rendered in a prior class action suit and allowing the relitigation of the same issues involving the same parties in a subsequent class action, and (b) entertaining a disparate impact claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-624 ("ADEA"), the Ninth Circuit not only ignored established law, but also the enormous damage its decision will cause in the workplace.

If the Ninth Circuit's decision in this case stands, employers will be discouraged from deviating from the status quo, as doing so could alter the "nucleus of facts" common to the class action members and expose the employer to the risk and exposure of renewed litigation. The finding that an employer's *beneficial* changes to an employment policy triggered a change in facts sufficient to negate a prior judgment's preclusive effect will be a disincentive for other employers to implement, alter, or improve workplace policies and benefits. Furthermore, the Ninth Circuit's resultant failure to honor a court judgment – thereby subjecting an employer to duplicative litigation – jeopardizes the incentives to settle Rule 23(b)(2) class claims. Such consequences would be detrimental to both employers and employees.

The holding by the Ninth Circuit that the ADEA permits a disparate impact analysis would likewise impose unwarranted burdens on well-meaning employers. Many of the CELE's members – and countless other employers subject both to class action suits and the ADEA – have multi-state operations. The current split between the Courts of Appeals regarding whether the ADEA is subject to disparate impact analysis hinders employers' ability to create uniform employment policies. Therefore, a definitive resolution of these issues by this Court is necessary.

INTRODUCTION AND SUMMARY

The Ninth Circuit's refusal to honor a judgment in a prior class action suit where the class was adequately represented and properly certified under FED. R. CIV. P. 23(b)(2), and instead permit the relitigation of the same issues involving the same parties in a subsequent class action certified under Rule 23(b)(3), not only violates the principles of res judicata and collateral estoppel, but also threatens the integrity of the class action process itself. For employment class action litigation in particular, this decision, if upheld, will place employers in a lose-lose situation when faced with injunctive class action suits, and reduce the incentive to settle and make positive employment policy changes. Moreover, the Ninth Circuit's determination that disparate impact claims are cognizable under the ADEA runs contrary to the act's intent and public policy.

Petitioner United Airlines implemented a weight policy for all of its flight attendants in the early 1970s. Charging that this weight policy was unfairly implemented and thus discriminated against women in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII"), a group representing "all present and future female [United] flight attendants" filed an "injunctive" class action suit certified under Rule 23(b)(2).

The District Court upheld the validity of United's weight policy, but determined that the airline had enforced it in a discriminatory manner. The judgment entered on October 30, 1979 permitted United to continue using the weight policy, as long as it was implemented in accordance with Title VII. Subsequently, the parties entered into an agreement whereby United increased the weight limits for men, women, and older employees.

Nonetheless, in 1992 Respondents once again attacked the facial validity of the same weight policy in the Northern District of California. In addition to sex-based disparities

allegedly inherent in the policy itself, the Respondents claimed that the policy has a disparate impact on older employees in violation of the ADEA. This time, the class sought damages as their exclusive remedy, thereby garnering a Rule 23(b)(3) certification, which imposes stricter notice requirements, and gives members the opportunity to opt out of the class.

The District Court properly dismissed this new suit, holding that the Title VII claims were precluded by the prior judgment and that the ADEA does not provide for disparate impact analysis.[2] A divided panel of the Ninth Circuit reversed on both grounds. Among the reasons for finding that the plaintiff class was not precluded from relitigating the legality of the weight policy were a supposed change in controlling facts due to the adoption by United of more lenient standards, and the fact that a Rule 23(b)(2) suit differs from a Rule 23(b)(3) suit in that it does not permit class members to opt out, as required in a suit for damages. These justifications, as will be explained, not only defy common sense, but also public policy. If allowed to stand, this decision will have disastrous repercussions for class action suits in general, and employment policy in particular.

For these reasons, the CELE urges this Court to grant the petition for a writ of certiorari, and to reverse the decision of the Ninth Circuit.

ARGUMENT

I. The Decision In *Frank* Would Effectively Negate Two Prime Purposes Of Class Action Lawsuits: Efficiency And Avoidance Of Inconsistent Adjudications.

Class action litigation – rooted in English common law and incorporated into American jurisprudence by the mid-

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[2] The adequacy of the prior representation was not challenged by Respondents before the District Court or the Ninth Circuit.

1800s[3] – remains a necessary procedural device for adjudicating complex, multiparty claims. This Court has emphasized that the justifications for class action lawsuits include the need to protect the defendant from inconsistent obligations, protect the interest of absentees, provide a convenient and economical means for disposing of similar lawsuits, and facilitate the spreading of litigation costs among numerous litigants with similar claims. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 423 (1980).[4]

The efficiency and finality goals of class action litigation are thoroughly intertwined. The aggregation of similar claims into one suit not only enables a large group of grievants – who otherwise may not have the financial resources to set forth individual claims – to have their claims heard,[5] but also prevents relitigation of the same claims. One final, binding adjudication of a class claim precludes the possibility of inconsistent decisions and clogged dockets.

These benefits conferred upon all parties are highly instrumental in the employment context. Class actions provide past and present employees with an efficient and cost-effective means of resolving similar claims. Class actions are particularly suited to address charges of discriminatory employment practices that affect a large number of employees. In return, employers need only

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[3] WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE Rule 23 § 1751 (2d ed. 1986).

[4] *See also Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, *reh'g denied*, 446 U.S. 947 (1980).

[5] *See, e.g.*, The Harvard Law Review Association, *Developments in the Law – The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 HARV. L. REV. 1806, 1808 (May 2000) (class action seeks to enhance procedural fairness by ensuring that people who have been wrongly harmed have access to the judicial system).

defend against one suit and garner the certainty that a court-sanctioned policy or practice can thereafter be followed without exposure, absent a change of law or controlling fact.

The decision in *Frank v. United Airlines, Inc.*, 216 F.3d 849 (9th Cir. 2000), however, if upheld, would radically disrupt this balance of benefits. The fundamental rights of hundreds of thousands of past and future class action litigants – plaintiffs and defendants – are implicated.

A. *Frank* Would Encourage A Needless Proliferation Of Litigation, Including The Resurrection Of Countless Losing Party's Class Action Suits.

The Ninth Circuit's decision in *Frank* will no doubt lead to an onslaught of duplicative litigation. Essentially, a plaintiff could relitigate an entire case simply by requesting damages. Under *Frank*, a plaintiff's attorney who filed – and lost – a Rule 23(b)(2)[6] class action, can theoretically refile the same suit the next day by reclassifying the case as one for damages. This is not so in any Circuit which has faced this issue except the Ninth.[7] This holding will have disastrous repercussions.

For example, *Frank* will open a Pandora's box of employment discrimination suits for classes certified prior to 1991. The 1991 amendments[8] to the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, provided for the award of

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[6] Class actions certified under FED. R. CIV. P. 23(b)(2) typically are suits for injunctive relief. In the employment context, the class generally seeks relief in the form of a court-ordered change in an employment practice along with the equitable remedy of back pay. *See, e.g.*, Stephen Bough and Dirk Hubbard, *Issues in Employment Class Action Litigation*, 56 J. MO. BAR 37 (Jan./Feb. 2000).

[7] *See, e.g., Kyriazi v. Western Electric Co.*, 647 F.2d 388, 393 (3d Cir. 1981); *In re Agent Orange Product Liability Litigation*, 996 F.2d 1425 (2d Cir. 1993); *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973).

[8] Pub. L. 102-166.

compensatory and punitive damages in employment discrimination cases. Prior to 1991, an employee or class was precluded from seeking such damages. Thus, many employment class suits were certified under Rule 23(b)(2).

The practical effect of the *Frank* decision on this issue is that *all* significant class action suits certified under Rule 23(b)(2) *before* 1991 may now be relitigated as suits for damages. Previously settled and dormant class actions will be subject to relitigation on the same substantive issues whenever class counsel can bootstrap jurisdiction in the Ninth Circuit. Doing so exposes employers and other defendants – as well as the judicial system – to the type of relitigation "gaming table" atmosphere that prompted the banishment of the doctrine of mutuality of estoppel by this Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 330 (1971). The need to avoid this judicial redundancy is exactly why class actions were implemented in the first instance.[9]

B. The Inevitable Duplication Of Claims Will Completely Eliminate Rule 23's Protection Of Defendants From Inconsistent Obligations And Vitiate The Purpose Of The Rule.

Federal Rule 23 was devised to facilitate an expeditious and economical means of processing multi-party litigation. As part of this system, the preclusive effects of res judicata and collateral estoppel ensure that the parties are not subject to duplicative and inconsistent adjudications.[10]

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[9] *See, e.g.*, Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L. J. 507, 525 (Summer 1987). ("The raison d'être for a [Rule 23](b)(2) class – that injunctive relief is applicable to the class as a whole – would be undermined if duplicative suits could result in conflicting judgments).

[10] *See, e.g.*, James Wm. Moore ET AL., MOORE'S FEDERAL PRACTICE, § 23.02 (3d ed. 1999): "A class action provides a

Frank ignores the intent of the Rule. In *Frank*, an issue that was previously litigated in *Air Line Pilots Ass'n Int'l v. United Air Lines, Inc.*, 26 F.E.P. Cases 607 (E.D.N.Y. 1979) – the legality of United Airlines' use of a weight limit policy – was resurrected with impunity in the subsequent lawsuit. The Ninth Circuit denied the preclusive effect of the prior action, even though the case involved the same issue, defendant, and plaintiff class. Thus, the Ninth Circuit subjected United Airlines' vindicated policy to renewed facial attack, turning the principles of claim and issue preclusion on their heads.

The Ninth Circuit attempted to distinguish *Frank* from *Montana v. United States*, 440 U.S. 147, 153 (1979), which held that an issue "actually and necessarily determined" by a court is "conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation," by claiming that the notice requirements of the prior Rule 23(b)(2) action failed to meet the more stringent notice and opt out requirements imposed by Rule 23(b)(3). Because of this asserted lack of opt out rights for all potential class members, the Ninth Circuit reasoned that it need not honor the prior judgment. However, this reasoning ignores the purpose behind the more stringent notice and opt-out requirements of 23(b)(3) certification. Rule 23(b)(3) was designed to address situations in which individual members of a class, although affected by some common wrong, experience particularized damages, and therefore are afforded the opportunity to "opt out" of the class and pursue their own lawsuits. Rule 23(b)(3) class members are often "loosely associated by common questions of law or fact, rather than

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single proceeding in which to determine the merits of the plaintiffs' claims, and therefore protects the defendant from inconsistent adjudications." *See also Geraghty*, 445 U.S. at 402-403 (the justifications that led to the development of class actions include the protection of the defendant from inconsistent claims).

by any pre-existing or continuing legal relationship," and therefore are in need of greater due process protection. WRIGHT & MILLER, § 1786, at 194. In contrast, because the Rule 23(b)(2) class is more cohesive, it is less likely that there will be special defenses or issues relating to individual members. *See Id.* at 195. Thus, the class is not provided with opt out rights, in part because any damages incurred are outweighed by the broader injunctive remedy, but also, logically, because greater commonality helps ensure adequate representation of all class members and justifies less than maximum due process protections for absent class members.

For example, a mass tort case involving a defective product derives from a common wrong (faulty product) but results in particularized damages among the plaintiff class members. A Rule 23(b)(3) certification is warranted to ensure that individuals with particularized damages are afforded their day in court. In contrast, a broad, uniformly-applied employment policy is best addressed via an injunctive class action suit, since the harm incurred is likely uniform in kind, if not degree, across the plaintiff class.

Granted, there will be members of a Rule 23(b)(2) class who believe their claims are unique, and thus warrant the opportunity for individualized suit. However, the very representative nature of class actions mandates that some individual claims be subjugated to that of the class. The class action was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individually named parties only. *See Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979); *In re A.H. Robbins Co., Inc.*, 880 F.2d 709 (4th Cir. 1989), *cert. denied*, 493 U.S. 959. Therefore, that all members of the 23(b)(2) class in *Frank* were not necessarily notified pursuant to Rule 23(b)(3)[11] and not given

[11] It should be noted that the notice of the 23(b)(2) class action in this case met the more stringent requirements of a Rule 23(b)(3) "damages" class certification.

a chance to opt out is inapposite for determining the judgment's preclusive effect. The substantive issue decided (the legality of the employment policy) is an issue that affects the class uniformly, does not raise the same due process concerns anticipated by a typical Rule 23(b)(3) case, and was adequately adjudicated as an injunctive class suit. Allowing *Frank* to stand will therefore gut Rule 23(b)(2)'s purpose.

C. Equivalent Procedural Protections Satisfy Rule 23 Standards.

The injunctive class in *ALPA* was provided with ample procedural protections typical of properly administered Rule 23(b)(2) class actions. In fact, the plaintiff class in *Frank* does *not* challenge the validity of the prior 23(b)(2) certification or the adequacy of the prior class representation. It stands to reason that unless the prior action was somehow inherently unfair, the class members were adequately represented and thus bound by the prior judgment.

In *Stewart v. Rubin*, 948 F. Supp. 1077 (D.D.C. 1996), for example, the court ruled that even though an employee was not permitted to opt out of a class in a racial discrimination case, she was nonetheless bound to the settlement reached in the action, since the requirements of due process and fundamental fairness had been satisfied. In determining that the process was fair, the court noted that she had been adequately represented by the named plaintiffs and by a capable and experienced class counsel.[12] So, too, were the members of the 23(b)(2) class in *Frank*.

Additionally, that the plaintiffs now seek monetary damages is irrelevant to the underlying fairness issue. The

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[12] The adequacy of representation has been a critical factor in determining the preclusive effect of a class judgment. *See, e.g., Hansberry v. Lee*, 311 U.S. 32 (1940); *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 691 (1961).

heightened concerns that drive the policy behind the "opt out" requirement of Rule 23(b)(3) do not rise to a constitutional level merely because money damages are implicated if a class has previously been properly certified under Rule 23(b)(2).[13] Although Rule 23(b)(2) cases are primarily suits for declaratory and injunctive relief applicable to the class as a whole, "it is not uncommon in employment discrimination cases for the class also to seek monetary relief in the form of back pay or front pay." *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997). Courts generally allow Rule 23(b)(2) classes to recover monetary relief in addition to declaratory injunctive relief, at least where the monetary relief does not predominate. *See Prove v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983); *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1372 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); WRIGHT & MILLER at § 1775; JAMES WM. MOORE, ET AL. at § 23.40[4].

In *Frank*, since the issue was United's employment policy as a whole, a Rule 23(b)(2) certified class was appropriate, and fairly executed. Therefore, the original judgment regarding the validity of that policy should stand. The decision of the Ninth Circuit, to the contrary, is at odds with the requirements of Rule 23, and should be overturned.

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[13] For example, in cases involving so-called "hybrid" actions, other courts have consistently held that opt-out rights are not required but may be permitted by the court under the provisions of Rule 23(d). *See, e.g.*, James Wm. Moore ET AL., at § 23.43[6][b] and cases cited therein.

II. The Resultant Increase In Duplicative Litigation Will Exacerbate An Already Backlogged Court System.

A. Lack Of Inducement To Settle Will Needlessly Prolong Litigation.

Frank not only jeopardizes the preclusive effect of prior judgments, but also the finality of settlements and consent decrees. Although only the prior court's *judgment* was at issue in *Frank*, since the parties' post-judgment agreement to implement United's revised policy was never submitted to the court for formal approval, the reasoning in *Frank* would apply with equal force to consent decrees.

The enforceability of a valid consent decree as equal to that of a court judgment is well established. It has been noted that as long as there is sufficient notice and representation, "there are few instances in which a class action defendant should not receive the full benefit of the doctrine of res judicata whether based upon trial on the merits or settlement." *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, *aff'd*, 645 F.2d 699, *cert. denied*, 454 U.S. 1126 (1981). Additionally, § 108 of the Civil Rights Act of 1991,[14] codified at 42 U.S.C. § 2000e-2(n), shields valid consent decrees from collateral attack. *Frank*, however, renders consent decrees entered pursuant to Rule 23(b)(2) class actions vulnerable. Consequently, *Frank*, if let stand, will contravene the purpose behind 42 U.S.C. § 2000e-2(n) of fostering settlement and will discourage mutually agreeable solutions – consent decrees being only one such example – to class action litigation.

There are a number of benefits to resolving employment-related charges at the outset. First and foremost, both parties save a great deal of time and money by foregoing often protracted and invariably expensive litigation. Second, early disposition of claims – especially through cooperative

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[14] Pub. L. 102-166.

alternative dispute resolution methods – helps to preserve the post-lawsuit employment relationship. Finally, early settlements often involve consent decrees in which employers agree to implement beneficial workplace changes.

It is not surprising, therefore, that the Civil Rights Act of 1991 encourages such pretrial resolutions. Section 118 of Pub.L. 102-166 promotes the use of alternative dispute resolution methods such as settlements, negotiations, conciliation, fact finding, and arbitration.

Most parties have taken heed. Between 1990 and 1998, out-of-court settlements rose from 31 percent to 35 percent.[15] Voluntary dismissals increased from 8 percent to 13 percent during the same time period. Proceeding to trial is significantly less common. The percentage of employment-related cases that were resolved via verdict or some other form of judgment for either of the parties had actually *decreased* from 9 percent in 1990 to 5 percent in 1998.[16]

If *Frank* is upheld, this trend will likely reverse. The loss of a 23(b)(2) settlement's binding effect would eliminate any inducement to partake in such pretrial resolution methods. Employers, as the defendants to employee class actions, would be disinclined to settle – to the disadvantage of both parties and the judicial system at large – because it would be senseless to pay money to make a problem go away if the solution is merely temporary. In order to concede some degree of culpability, employers need a fair assurance that not only will all members be bound by the resolution, but that the resolution of the claim itself will endure.

Because of the uncertainty inherent in *Frank*, cases formerly prone to settlement will instead proceed to trial. Such a result clearly runs contrary to public policy.

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[15] Marika F.X. Litras, "Civil Rights Complaints in U.S. District Court, 1990-98," (NCJ-173427).
[16] *Id.*

B. The Burdens On Our Overtaxed Court Systems Would Grow.

The predicted reduction in settlements and relitigation of recertified class action suits will no doubt further hamstring the judicial system's ability to process employment discrimination claims. Class action suits ordinarily resolved through early settlement or voluntary dismissal would instead proceed to fully litigated conclusions – a time-consuming and financially burdensome process.

The economies of scale generated by class action suits ordinarily confer cost and time savings on the judicial system. Class actions "improve judicial efficiency by aggregating a multitude of individual claims . . . eliminate or reduce the threat of repetitive litigation," and thus "[free] the court system to adjudicate more claims with less delay."[17]

Despite this efficiency, a recent increase in class action litigation has imposed new costs for employers and new burdens for the courts.[18] According to a recent study of class actions put forward by the RAND Institute for Civil Justice, federal judges spend about five times as many hours on class actions as on "average" civil cases.[19] If *Frank* stands and proliferates, the increase in class action suits will further clog an already over-loaded employment litigation docket.

In Fiscal Year 1999, the reported number of employment discrimination charges filed with the EEOC totaled 77,444.[20] Private employment suits also grew at an astronomical rate.

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[17] 113 HARV. L. REV. at 1808.

[18] RAND INSTITUTE FOR CIVIL JUSTICE: *Class Action Dilemmas, Pursuing Public Goals for Private Gain* (Nov. 1, 1999).

[19] *See* Thomas Willging, Laurel Hooper, and Robert Niemic, *Empirical Study of Class Actions in Four Federal District Courts*, Washington, D.C.: FEDERAL JUDICIAL CENTER, 1996.

[20] EEOC Charge Statistics, as published and available at http://www.eeoc.gov/stats/charges.html.

In January of the year 2000, the Bureau of Justice Statistics published a study showing that from 1990 through 1998, private employment-related civil rights cases nearly tripled.[21] Private employment-related complaints accounted for approximately 65 percent of the overall increase in cases that have flooded the U.S. District Courts in this period.[22]

Employment-related class action suits have likewise increased. Between 1996 and 1998, the number of civil rights class action suits increased from 213 to 265.[23] With the outcome of *Frank* encouraging the relitigation of most claims, these numbers will continue to escalate.[24]

III. Employers Are Left With No Incentive To Make Changes Beneficial To Employees.

In *Frank*, one of the purported rationales for relitigating the issues was that "the two suits did not arise from the same transactional nucleus of facts." *Frank*, 216 F.3d at 851. This "change" in facts, however, was merely the employer's implementation of a more lenient weight policy. In other words, because the employer voluntarily relaxed its weight policy requirements, the Ninth Circuit determined that the interests of the class had sufficiently changed to bar any preclusive effect of the prior suit. Not only is this conclusion nonsensical, but also detrimental to employees as a whole.

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[21] Marika F.X. Litras, "Civil Rights Complaints in U.S. District Court, 1990-98," (NCJ-173427). Employment discrimination cases increased from 8,413 filings in 1990 to 23,735 in 1998.

[22] *Id.*

[23] *Id.*

[24] The optimum strategy for plaintiff's counsel in the post-*Frank* landscape will be to file a Rule 23(b)(2) action first. If the class loses, *Frank* grants an automatic second bite at the apple under Rule 23(b)(3); if the class wins, it can use issue preclusion *against* the employer to ensure a victory in a second action for compensatory and punitive damages. Either way, the number of cases doubles.

Faced with the prospect of duplicative litigation, employers have little incentive to update, improve, eliminate, or alter their employment policies in any way. For instance, an employer that liberalizes its employee leave policy or increases health benefits would be triggering a "change" in employment conditions, thereby subjecting itself to the possibility of new litigation. It follows, therefore, that short of a judicial or legislative mandate, employers will maintain the status quo – to the detriment of all parties involved.

For these reasons, this Court must reevaluate the Ninth Circuit's decision. If permitted to stand, *Frank* would dramatically alter the employment class action landscape.

IV. Permitting A Disparate Impact Analysis Of ADEA Claims Contravenes Legislative Intent And Would Significantly Harm Well-Meaning Employers.

A. Nothing In The ADEA's Text, Legislative History, Or Subsequent Amendments Opens The Act To Disparate Impact Analysis.

Age – unlike sex, race, nationality or disability – is a unique legally protected category in that *all* employees will conceivably become a member of the protected class at some point in their careers. Therefore, the statutory protections conferred upon this class differ from those provided to classes protected under Title VII.

The legislative history of the ADEA reflects this difference. A study conducted by the Secretary of Labor on the causes and effects of age discrimination,[25] which served as the impetus for the ADEA, made a point of distinguishing between "arbitrary" age discrimination and other employment policies and actions that may disproportionately affect older employees, recommending that only the former

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[25] THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965) ("The Report"), mandated by Pub. L. No. 88-352, § 715, 78 Stat. 265 (1964).

be prohibited.[26] *See also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA").

Additionally, the language of the ADEA also distinguishes age discrimination from Title VII-prohibited discrimination. Under the ADEA, it is unlawful for an employer:

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.[27]

This general prohibition is qualified by § 623(f)(1): "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). This passage permits an employer to use factors other than age as rationales for adverse employment actions that differentially impact individuals protected under the ADEA. Read with the ADEA's general prohibition against age-based discrimination, it follows that: it shall be unlawful to "discriminate against any individual . . . because of such individual's age," except when "based on . . . factors other than age." If § 623(f)(1) were not intended to exclude a disparate impact claim, then this section would stand for the circular proposition that "only age discrimination is age discrimination."[28]

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[26] The Report at 21-25.

[27] 29 U.S.C. §623(a)(1).

[28] *See also Markham v. Geller*, 451 U.S. 945, 947 (1981) (Rehnquist, J., dissenting from denial of cert.) (interpreting 29 U.S.C. § 623(f)(1) as denying an ADEA disparate impact analysis); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996) (same); *EEOC v. Francis W. Parker School*, 41 F.3d 1073

Moreover, the fact that the Civil Rights Act of 1991 amended Title VII by explicitly providing for causes of action based upon disparate impact,[29] but did not do the same when it simultaneously amended the ADEA,[30] further supports the idea that Congress did not envision such age-based disparate impact claims.

The First, Seventh, and Tenth Circuits have already come to this conclusion.[31] This Court, in addition to the Third, Sixth, and Eleventh Circuits, has expressed in *dicta* that the ADEA likely does not permit disparate impact analysis. *See, e.g., Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042 (6th Cir. 1998); *Broaddus v. Florida Power Corp.*, 145 F.3d 1283 (11th Cir. 1998). The Second, Eighth and Ninth Circuits, however, have disregarded this Court's analysis of § 623(f)(1) of the ADEA in *Hazen Paper*, and have instead permitted disparate impact claims to proceed. *See, e.g., Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999).

This Circuit split will continue to plague multi-jurisdiction employers until this Court resolves the issue. Most large companies conduct operations across judicial circuits. Absent a uniform decision as to whether the ADEA permits a claim for disparate impact, employers will be subject to inconsistent precedent. Inconsistent applications of the ADEA prevent an employer from implementing uniform policies and practices, and encourage forum shopping by plaintiffs.

(7th Cir. 1994) (same); *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir.), *cert. denied*, 120 S.Ct. 44 (1999) (same).

[29] Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (1991).

[30] *See, e.g., Id.* at § 115; 105 Stat. at 1079.

[31] *See, e.g., supra* note 28.

B. Non-Discriminatory Employers Will Be Unjustly Penalized.

Additionally, recognizing a claim for disparate impact under the ADEA would routinely impose unjustified liability on employers. Older workers represent a significant percentage of the labor force. This is due in large part to the participation of the "baby boom" cohort (individuals born in the United States between 1946 and 1964). Currently, there are more than 83 million baby boomers in this country.[32] When this cohort entered the workforce, they increased the size and median age of the labor market.

According to a study conducted by the Bureau of Labor Statistics, by the year 2005, the number of workers age 45 and older will total approximately 55 million, equaling about 37 percent of the labor force.[33] These statistics reflect an increase from 1995, when it is estimated there were about 41 million workers age 45 and older, representing approximately 31 percent of the labor force.[34] By 2005, the median age of the workforce is predicted to reach 41 years of age.[35]

The practical effect of this "graying" of the workforce for employers is that a typical work site already is or soon will be populated by a *majority* of employees protected by the ADEA. Almost any management decision, including revisions of policies, terminations, and hiring choices, is bound to impact this older population simply by virtue of its size. Thus, effectively any employment action – such as a

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[32] Stacy Poulos and Demetra Smith Nightingale, *The Aging Baby Boom: Implications for Employment and Training Programs*, URBAN INSTITUTE, prepared for the U.S. Department of Labor, Employment and Training Administration, under Contract No. F-5532-5-00-80-30.

[33] *See* Howard N. Fullerton, *The 2005 Labor Force: Growing, But Slowly*, MONTHLY LABOR REVIEW (Nov. 1995).

[34] *Id.*

[35] *Id.*

reduction-in-force, change in benefit plan, or implementation of stricter hiring standards – would be subject to disparate impact scrutiny. It follows that almost every employment action would be susceptible to litigation. Employers would be put in the unfortunate position of having to justify how their facially neutral, *non-discriminatory* decisions, which may incidentally impact employees 40 years and older, are necessary to the operation of their businesses.

While it is imperative that employers be held accountable for management decisions that intentionally discriminate against older workers, it is equally important that they *not* be unjustly punished for nondiscriminatory actions that may incidentally impact older employees. Doing so would impose undue burdens on employers, and would also burden the courts with potentially frivolous litigation. Legislative history points to the fact that disparate impact claims were never intended to be cognizable under the ADEA, and allowing employees to bring such claims invites abuse.

CONCLUSION

The Council for Employment Law Equity respectfully urges this Court to grant the writ of certiorari to review the judgment below, to reverse the ruling that would permit the class of United Airlines flight attendants to relitigate their claims, and to recognize that the ADEA does not provide for disparate impact analysis.

Respectfully submitted,

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